Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	CC Docket No. 96-98
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	CC Docket No. 95-185

REQUEST FOR STAY PENDING JUDICIAL REVIEW

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SUMMARY

Section 251(c) of the Telecommunications Act of 1996 creates two distinct options for a new entrant seeking to compete in the telecommunications services market without building a complete facilities-based network of its own: The new entrant may purchase unbundled network elements from the incumbent local exchange carrier, or it may purchase finished retail services from the incumbent and resell them. As the recent decision of the Eighth Circuit concerning the implementation of section 251(c) confirms, each of these options has a distinct set of advantages and disadvantages. For the unbundled network element option, the chief advantage is cost-based pricing; the disadvantages are that the purchaser must bear the business risks associated with an up-front investment in dedicated facilities or capacity and the cost of assembling individual elements into an integrated service.

The Reconsideration Order upsets the Act's careful balance by eliminating the disadvantages associated with purchasing unbundled network elements. In so doing, the order eviscerates the distinction between the unbundled element and resale options, effectively enabling new entrants to buy finished services at unbundled element prices whenever it suits their interests. This will distort competition and enable new entrants to circumvent the universal service subsidies embedded in current rate structures, leading to the rapid destruction of the existing system for supporting universal service. The resulting harm to both the public interest and U S WEST and other incumbent carriers will be severe. Moreover, these harms will follow swiftly even from temporary operation of the Reconsideration Order, and will not be redressed by subsequent compensation or other remedial measures. Accordingly, the Commission should stay the Reconsideration Order pending judicial review.

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U S WEST, Inc. ("U S WEST") respectfully requests that the Commission grant a stay of its Third Order on Reconsideration, FCC 97-295, ("Reconsideration Order"),[1/] pending judicial review of that order.[2/]

INTRODUCTION

The Commission's newly devised notion of "shared transport" is nothing more than an unlimited right of new entrants to require an incumbent local exchange carrier ("LEC") to transport the new entrants' traffic, on an as-needed basis, anywhere in the incumbent's network using its own routing tables. Forcing incumbents to provide this finished service at cost-based prices by mislabeling it as an unbundled network element violates the unbundling provisions of the Telecommunications Act of 1996 ("1996 Act" or "Act") and cannot be

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1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, Third Order on Reconsideration, FCC 97-295 (rel. Aug. 18, 1997).

2/ U S WEST filed a petition for review of the order in the United States Court of Appeals for the Tenth Circuit on September 5, 1997. U S WEST also may participate in appeals that other interested persons may file.

reconciled with the July 18, 1997 decision of the Eighth Circuit in Iowa Utilities Board v. FCC, Nos. 96-3321, et al. As that court ruled, there is a fundamental difference between the provision of unbundled network elements under section 251(c)(3) of the Act and the provision of finished services for resale under section 251(c)(4). Under the Act, the purchaser of unbundled elements must assume certain business risks and costs that the purchaser of finished services for resale does not bear. The Reconsideration Order would eliminate these responsibilities and with them any difference between unbundled network elements and finished services available for resale. As a result, new entrants would be able to choose between two distinct prices for the very same service, using whichever pricing scheme is more advantageous under the circumstances.

This would destroy the existing system of universal service support long before the new system mandated by the 1996 Act can be put in place. U S WEST would suffer irreparable injury through its incumbent LEC, U S WEST Communications, Inc. ("USWC"), which would sustain both a rapid loss of the revenues that support its universal service obligations and an artificially induced loss of customers to its competitors. The public interest would be harmed through destruction of the viability of state universal service regimes. Therefore, the Commission should grant a stay of the Reconsideration Order.

FACTUAL BACKGROUND

1. The Subsidies Implicit in Current Rate Structures. The Commission and state regulators have long structured prices for telecommunications services to promote the policy of universal service. Incumbents have been required to price some services substantially below the cost of providing them in order to make them more affordable, while setting the prices of other

services substantially above their costs to make up the shortfall.[3] In particular, USWC has been required to charge rates well below its costs for services that are expensive to provide, such as residential service in rural areas, and rates well above its costs for business and exchange access services. See attached Declaration of Michael R. Jude (Sept. 9, 1997) ("Declaration") ¶ 5.

For example, in Colorado USWC's average cost of providing local service is $27.32 per month. Id. ¶ 6. However, the monthly rate for residential service is just $14.58. Id. The rate for local business service, on the other hand, is $36.71. Id. In effect, state regulators require USWC's Colorado business customers to pay relatively high rates for business service in order to subsidize below-cost rates for residential service.

2. The 1996 Act and the Eighth Circuit's Decision. The 1996 Act is designed to foster competition in local service while preserving universal service and the quality of the public telecommunications network. Toward those balanced ends, it requires incumbent LECs to make available to new entrants both (i) unbundled network elements at cost-based prices -- that is, at prices "based on the cost (determined without reference to any rate-of-return or other rate-based proceeding) of providing . . . the network element," 47 U.S.C. § 252(d)(1)(A)(i); and (ii) finished retail services at wholesale prices, for resale by the new entrants.

In the appeal of the First Report and Order on interconnection before the Eighth Circuit,[4] incumbent LECs sought to establish that the Act does not permit new entrants to

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[3] See Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45 (rel. May 8, 1997) ("Universal Service Order") ¶¶ 10-11, 14.

[4] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499 (rel. Aug. 8, 1996) ("First Report and Order").

assemble services entirely out of unbundled network elements purchased from the incumbent. They reasoned that such "unbundling" is simply a sham -- what the new entrant is purchasing is neither "unbundled" nor "elements," but rather a fully finished service identical to those covered by the Act's resale provisions. The Eighth Circuit rejected this argument on the ground that purchasing all the elements needed to provide a service is not identical to purchasing the finished service under the Act's resale provisions. To the contrary, the court held that the Act imposes significant limitations on an unbundling strategy, limitations that distinguish unbundling from resale. The Eighth Circuit decision thus confirmed that the Act's unbundling and resale provisions offer two distinct competitive options, each with different advantages and risk profiles.[5]

Simply put, to qualify for the cost-based prices applicable to unbundled network elements rather than the wholesale prices applicable to resale, a requesting carrier must be more than a passive reseller of services assembled by the incumbent LEC. Section 251(c)(3) of the Act requires incumbent LECs to provide new entrants with "access" to "network elements" on an "unbundled" basis. 47 U.S.C. §§ 251(c)(3). Access to unbundled network elements entitles and requires a new entrant to select the equipment or specified capacity that it wishes to utilize and to purchase the dedicated use of that equipment or capacity, through an up-front investment. The Commission itself has described access to an element as the purchase of a "physical

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[5] U S WEST does not seek here to relitigate the question whether new entrants may assemble services entirely out of unbundled network elements. The Eighth Circuit decision, unless reversed, resolves that issue. What U S WEST does challenge is the Reconsideration Order's flat repudiation of the limitations the Eighth Circuit held that the Act does impose on competition via unbundled elements -- a repudiation that enables new entrants to employ the sham of engaging in resale but calling it unbundling.

facility,"[6] and has said that a requesting carrier must invest in an unbundled element and bear the risk "that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost."[7] In the same vein, the Eighth Circuit held: "A carrier providing services through unbundled access . . . must make an up-front investment that is large enough to pay for the cost of acquiring access . . . without knowing whether consumer demand will be sufficient to cover such expenditures." Iowa Utilities Board, slip op. at 144.

In addition to investing in elements, a new entrant also must bear the responsibility for combining the unbundled elements that it acquires. Under the Act, incumbents must make network elements available "in a manner that allows requesting carriers to combine such elements." 47 U.S.C. § 251(c)(3). Thus, "the plain meaning of the Act indicates that requesting carriers will combine the unbundled elements themselves" and therefore requesting carriers "will in fact be receiving the elements on an unbundled basis." Iowa Utilities Board, slip op. at 143.[8]

At the same time, the availability of unbundled elements gives new entrants an opportunity to gain competitive advantage. As noted, the price for an element must be based on its economic cost. 47 U.S.C. § 251(d)(1). Thus, if the entrant accurately predicts demand, it can

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[6] First Report and Order, 11 FCC Rcd. 15631 para. 258; see also id. at 15634 para. 264, 15668 para. 334.

[7] Id. at 15668 para. 334. The Commission noted further that "some markets may never support new entry through the use of unbundled network elements because new entrants seeking to offer services in such markets will be unable to stimulate sufficient demand to recoup their investment in unbundled elements." Id. (emphasis added).

[8] See also Iowa Utilities Board, slip op. at 141 ("While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements.").

substantially reduce its cost per unit of service. In addition, the entrant can differentiate its service from the incumbent's by, for example, providing different features or quality. See First Report and Order, 11 FCC Rcd. at 15668 para. 333.

By contrast, a new entrant's right under section 251(c)(4) to obtain and resell an incumbent's finished retail services provides an entirely different package of rights and obligations. In the first place, the entrant need not select and invest in particular elements and has no obligation to combine the elements; instead, it simply hires the incumbent to transport its traffic, and the incumbent bears both the investment risk -- that is, the risk that it will over- or under-invest in capacity -- and the responsibility for combining, uncombining, and recombining its network on a call-by-call basis for the new entrant. The entrant pays only for its actual use of the incumbent's service, "on a unit-by-unit" basis. Iowa Utilities Board, slip op. at 144. "Consequently, a reseller is able to purchase only as many services (or as much thereof) as it needs to satisfy consumer demand." Id. But the entrant does not pay a cost-based rate for the incumbent's retail service. The price to the entrant is the incumbent's own retail price less a discount. Thus, where state regulators intentionally set the incumbent's retail price substantially above its cost -- that is, where the price reflects a substantial contribution to support universal service -- the entrant pays a price that significantly exceeds the cost-based price it would pay for unbundled elements.

3. The Reconsideration Order. In the Reconsideration Order, the Commission ruled that an incumbent must provide "shared transport" to new entrants as an unbundled network element at cost-based prices -- that is, "access, on a shared basis, to the same interoffice transport facilities that the incumbent uses for its own traffic." Reconsideration Order ¶ 22; see

also id. ¶¶ 25, 33. The order suggests that a new entrant may "obtain access to every transport facility within the incumbent's network . . . on an as-needed basis," id. ¶ 43, and should pay for the shared transport function "on a usage-sensitive basis." Id. ¶ 30. Thus, the Reconsideration Order purports to give new entrants the right to require an incumbent to satisfy their day-to-day needs on an ad hoc basis, whatever these happen to be and however much they may fluctuate, at cost-based rates.

The Commission rejected arguments that the purchaser of an unbundled element must make an up-front investment in a facility or specified capacity. It did recognize that "a key distinction between section 251(c)(3) and section 251(c)(4) is that a requesting carrier that obtains access to unbundled network elements faces greater risks than a requesting carrier that only offers services for resale." Id. ¶ 47. Nevertheless, the Reconsideration Order rejects contentions that, "by definition, network elements must be partly or wholly dedicated to a customer" or "a network element must be identifiable as a limited or pre-identified portion of the network." Id. ¶¶ 41, 43. The order states that, if "competitive carriers [were required] to use dedicated transport facilities" at this time, "they would almost inevitably miscalculate the capacity or routing patterns." Id. ¶ 35; see also id. ¶¶ 50-51. The order purports to relieve new entrants of the need to bear that risk, while asserting that, when a new entrant takes shared transport, it "must pay for all of the vertical features included in the switch" and therefore must "assume the risk associated with switching." Id. ¶ 47.

The Reconsideration Order also holds that incumbents must provide shared transport as a unitary whole, regardless of the fact that shared transport involves multiple "switching and transport facilities." Id. ¶ 44. Relying on the Eighth Circuit's failure to vacate section 51.315(b) of the Commission's rules, the order concludes that, "although incumbent LECs are not required to combine transport and switching facilities to the extent that those elements are not already combined, incumbent LECs may not separate such facilities that are currently combined . . . ." Id. And the order concludes that an incumbent's switching and transport elements are currently "combined" in its transport network. See id.

4. Effects of the Reconsideration Order. The Reconsideration Order will have immediate effects on USWC and on the public interest. The order will enable competitors to attract away USWC's most profitable retail business and exchange access customers by giving the competitors USWC's services for resale at cost-based prices well below not only USWC's retail prices, but its wholesale discount prices as well. This will make it impossible to sustain the universal service support embedded in the current rate structure. As profitable customers defect to USWC's competitors, USWC will lose the revenues that provide implicit subsidies for those services that are priced below cost. Declaration ¶ 8.

A numerical illustration makes plain why this is so. In the example of Colorado, noted above, USWC's business service is priced at $36.71 per month. A new entrant wishing to compete for USWC's business customers could, by maintaining the fiction that it is purchasing unbundled elements, obtain USWC's finished business services for about $27.32 See id. ¶¶ 6, 8. This would leave plenty of room for the new entrant to undercut USWC's price and win over its customers. For each customer lost, USWC would lose $3.52 per month in universal service support included in local rates, plus an additional $14.81 of support currently included in exchange access rates. Id. ¶¶ 10-11. The total amount of USWC's universal service support put at risk in this manner is $151 million per year in the state of Colorado alone. See id.

Of course, while avoiding the need to make any contribution to universal service subsidies, the new entrant would remain free to exploit the subsidies that flow to residential service. A new entrant competing for a residential customer, instead of buying unbundled elements at cost-based rates, may obtain USWC's finished service -- the average cost of which is \$27.32 in Colorado -- at the \$14.58 retail price minus a wholesale discount. Id. ¶ 8. The new entrant thus avoids contributing to universal service support yet benefits from that support each time it resells a subsidized service.

ARGUMENT

The Commission considers four factors in deciding whether to grant a stay of administrative action: (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood of irreparable injury to the party seeking the stay absent such relief; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest in the stay. E.g., In re Deferral of Licensing of MTA Commercial Broadband PCS, PP No. 93-253, Memorandum Opinion and Order, FCC 96-139 (rel. Apr. 1, 1996) (citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)). Each of the four factors supports a stay of the Reconsideration Order.

I. U S WEST IS LIKELY TO SUCCEED ON THE MERITS.

The Commission's Reconsideration Order obliterates the Act's bedrock distinction between access to unbundled network elements and the right to resell services. As the Eighth Circuit confirmed, the Act provides that, when acquiring an unbundled element, a new entrant must select the facilities or specified capacities it wants to use and must make -- and bear the business risks of making -- an up-front investment in those facilities or capacities. The new entrant also must bear the costs and risks of assembling the unbundled elements that it acquires. The Reconsideration Order is inconsistent with both of these statutory requirements.

A. Up-front investment in a facility or specified capacity. Section 251(c)(3) requires incumbent LECs to provide new entrants with "access to network elements on an unbundled basis." As that language suggests, Congress intended this provision to give new entrants a right to invest, at cost-based prices, in specific network facilities or capacities that they could use to provide services. In the context of transport among an incumbent's end offices, such building blocks are the individual trunks and switches that can be used to establish one or more paths between a particular pair of end offices. In other words, the unbundling provisions of the statute entitle a new entrant to identify and obtain access to dedicated facilities or capacity on a route-by-route basis within an incumbent's network.

Before the Reconsideration Order, unbundled transport facilities were understood in precisely these individual, route-by-route terms. Thus, in the First Report and Order the Commission based its conclusions on the views of commentators that "individual transport components should be available as unbundled elements"; the Commission accordingly sought to "specify particular components of local transport that should be unbundled." 11 FCC Rcd. at 15714 para. 429, 15715 para. 432 (emphasis added). In concluding that incumbents should be required to unbundle interoffice transmission facilities, the Commission found that "it is technically feasible for incumbent LECs to unbundle the foregoing interoffice facilities as individual network elements." Id. at 15719 para. 442 (emphasis added). The Commission also said that "access to these interoffice facilities will improve competitors' ability to design efficient network architecture." Id. at 15720 para. 447.

In the Reconsideration Order, the Commission has abruptly reversed course. The order allows new entrants to shift the responsibility for designing a network onto the incumbent by entitling them to use the incumbent's entire interoffice network on a bundled basis in the name of a supposed shared transport "element." Such a broad, undifferentiated right of use bears no resemblance to the specific, identifiable network components to which, as the Commission itself has acknowledged, the unbundling provisions of the Act were intended to apply.

- Under the Commission's own rules, "[a] telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time. . . ." 47 C.F.R. § 51.309 (emphasis added); see also Reconsideration Order ¶ 358 (a new entrant that purchases an unbundled network element receives "the right to exclusive access or use of an entire element"). Shared transport affords neither exclusive access to any facility nor the right to use one for any specified period of time.

- Network elements also must be separable ("unbundled") facilities or features associated with those facilities. As the Commission has explained, "the terms 'access' to network elements 'on an unbundled basis' mean that ILECs must provide the facility or functionality of a particular element to requesting carriers, separate from the facility or functionality of other elements." First Report and Order, 11 FCC Rcd. at 15635 para. 268 (emphasis added); 47 C.F.R. § 51.309(d). Shared transport, however, is inherently inseparable (cannot be unbundled) from network elements the Commission has already defined -- interoffice transport and tandem and local switching.

- Network elements are used "in the provision of a telecommunications service," 47 U.S.C. § 153(29) (emphasis added), rather than being underlying services themselves. See also id. § 251(c)(3) (allowing competitors to "combine such elements in order to provide . . . telecommunications service") (emphasis added). But shared transport is nothing more than the service of transporting calls from place to place. It makes use of shifting combinations of network elements throughout the

> ILEC's entire interoffice transport network, but it is itself neither a network element nor even a fixed combination of specified elements.[9]

By abandoning the concept of network elements as specific, identifiable facilities or capacity, the Reconsideration Order also repudiates the Act's requirement that new entrants bear ordinary business risks when purchasing unbundled network elements. As the Eighth Circuit explained, providing service through unbundled network elements is distinguishable from resale primarily because each method presents a different risk profile: Resellers avoid risk by matching supply with demand through the purchase of services "on a unit-by-unit basis." Iowa Utilities Board, slip op. at 144. The purchaser of a network element takes the risks associated with making "an up-front investment" in a capital asset; it does not know whether consumer demand will be sufficient to cover that expenditure. Id. Indeed, this difference was the only reason the Eighth Circuit held that the Commission's liberal unbundling rules would not eliminate resale as a market entry strategy. See id; see also First Report and Order, 11 FCC Rcd. at 15668 para. 334.

The Reconsideration Order purports to erase this difference in risks. It would allow new entrants to obtain ubiquitous interoffice transport with none of the risks previously identified by the Commission or the Eighth Circuit. They need not buy dedicated capacity and

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[9] The Eighth Circuit's decision that some vertical services may be unbundled as "network elements" does not mean that every finished service is an element. The Eighth Circuit's holding on this issue was limited: "We believe that in some circumstances a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either unbundling or resale." Slip op. at 133. In contrast to the vertical services that were the subject of the Court's holding, a shared transport unbundled element would give a new entrant access not simply to "features of an incumbent LEC's network" but to the incumbent LEC's entire network.

run the risk of over- or under-use. Reconsideration Order ¶¶ 33, 35. Instead of making an "up-front investment," they supposedly may pay after-the-fact only for the number of minutes they actually use. See id. ¶¶ 30, 43.[10] The investment risk thus lifted from new entrants does not disappear but is shifted entirely to incumbents, because they must forecast customer demand on behalf of each new entrant, build capacity to meet that demand, and bear the risk that their forecasts will turn out to be wrong.

Indeed, the Reconsideration Order takes the very risks that the Eighth Circuit held are inherent in doing business under the unbundling rules and posits them as entry barriers from which new entrants must be protected. The court ruled that a requesting carrier must make an up-front commitment to "acquir[e] access to all of the unbundled elements of an incumbent LEC's network that are necessary to provide local telecommunications services without knowing whether consumer demand will be sufficient to cover such expenditures." Iowa Utilities Board, slip op. at 144.[11] The Reconsideration Order expressly concludes that new entrants must not be required to bear this risk, noting that, if "competitive carriers [were required] to use dedicated

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[10] The order acknowledges that, under the Eighth Circuit's decision, the Commission lacks authority to "establish pricing rules for shared transport." Reconsideration Order ¶ 30. But it goes on to establish usage-sensitive pricing as the rule it will follow in arbitrating interconnection agreements under section 252(e)(5). Id. And it purports elsewhere to establish a mandatory rule that shared transport be made available on an "as-needed," "usage sensitive" basis. Id. ¶¶ 33, 35, 43.

[11] The Reconsideration Order appears at one point to acknowledge this requirement, noting that doing business through unbundled network elements differs from resale because a carrier that purchases a network element "must pay for the cost of the entire element, regardless of whether the carrier has sufficient demand for the services that the element is able to provide." Reconsideration Order ¶ 47.

transport facilities" at this time, "they would almost inevitably miscalculate the capacity or routing patterns." Id. ¶ 35; see also id. ¶¶ 50-51.

Nor is there any merit to the suggestion in the Reconsideration Order that a purchaser of shared transport nevertheless bears some risk in acquiring switching as part of shared transport. See Reconsideration Order ¶ 47. A carrier incurs the risk of buying vertical switching features when it purchases unbundled switching; it incurs no additional risk by taking shared transport. In any event, the risk associated with taking vertical features is insignificant. The Commission itself noted that the incremental costs associated with such features "may be quite small." First Report and Order, 11 FCC Rcd. at 15707 para. 414.

B. Combining elements. The 1996 Act requires incumbent LECs to provide access to unbundled elements "in a manner that allows requesting carriers to combine such elements." 47 U.S.C. § 251(c)(3) (emphasis added). As the Eighth Circuit confirmed, this means that, when a new entrant uses unbundled network elements to provide service, it must undertake to assemble those elements just as an incumbent does. Iowa Utilities Board, slip op. at 141. In addition to specifying what elements it will purchase, with what capacity and in what locations, the new entrant must combine the elements into a functioning network over which its calls can be carried. Contrary to the plain intent of Congress, the Reconsideration Order relieves new entrants of the obligation of combining the network elements they purchase.

When a call is made over the switched telephone network, it may be routed between the incumbent's end offices over a variety of different paths, each of which utilizes a different temporary combination of the switches, trunks, and other network elements that make up the incumbent's interoffice network. When providing shared transport for a new entrant, the incumbent would have to choose a specific call path for each call and then combine the network elements along that route for the duration of the call. Thus, purchasing shared transport would allow entrants to obtain undifferentiated use of U S WEST's entire interoffice network on a bundled basis and leave entirely to U S WEST the responsibility to choose and combine the particular network elements to be used to route each call from end office to end office. This outcome violates the Act and contravenes the Eighth Circuit's decision.

Contrary to the Reconsideration Order (¶ 44), the Eighth Circuit's failure to vacate section 51.315(b) cannot override the court's carefully explained and express holding — on the very same subject — that requesting carriers cannot force incumbent LECs to combine network elements for them. Iowa Utilities Board, slip op. at 143.[12] In any event, section 51.315(b) does not support the provision of shared transport. The various interoffice trunks between an incumbent's end offices and tandem switches are not "currently combined"; rather, the particular elements needed for a particular call are combined when the call is set up and then uncombined when the call is completed.

II. THE BALANCE OF HARMS AND THE PUBLIC INTEREST FAVOR THE GRANT OF A STAY.

The Reconsideration Order will distort competition, prevent USWC from recovering its costs of complying with universal service obligations, and reduce the quality and reliability of USWC's services. These effects of the order will harm both USWC and the public

[12] U S WEST and others have petitioned the Eighth Circuit for rehearing to clarify or reconsider one narrow aspect of the court's decision: the court's failure to vacate 47 C.F.R. § 51.315(b). Petition for Rehearing, Iowa Utilities Board v. FCC, Nos. 96-3321 et al. (8th Cir., filed Aug. 19, 1997). The Commission need not await the disposition of that petition to conclude that the Reconsideration Order conflicts with the court's express holding that requesting carriers cannot force incumbent LECs to combine network elements.

interest. Grant of a stay, on the other hand, would cause no substantial harm to the public or to third parties. Thus, the balance of equities strongly favors a stay.[13/]

Once the Reconsideration Order takes effect, new entrants will be able to purchase USWC's services without paying the wholesale rates specified by the Act's resale provisions or assuming the business risks inherent in an unbundling strategy. Entrants will obtain finished local services from USWC using shared transport together with (more legitimate) unbundled elements such as local loops and switches, at cost-based rates -- and without taking the risk of making any up-front commitments.

This will enable new entrants to underprice USWC and attract away its customers. First, by obtaining transport on an as-needed basis, new entrants will avoid the costs of over- or under-capacity, giving them an artificial cost advantage over USWC. Declaration ¶¶ 13-15. Second, with an easy and risk-free way to obtain finished services at cost-based prices, new entrants universally will avoid paying the above-cost rates that form the backbone of state universal service support.[14/] New entrants thus will be able to underprice by a significant margin USWC's retail business services and exchange access services. As noted, in the example of Colorado, a new entrant will be able to obtain USWC's business service, for which USWC must

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13/ In such circumstances, a stay is appropriate so long as the moving party has "made a substantial case on the merits." Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

14/ In fact, as noted, new entrants will get the best of both worlds with respect to universal service support: They will avoid making any contributions while at the same time benefiting from the support by using the Act's resale provisions to obtain supported services at below-cost rates. Thus, the system of universal service support will violate the requirement of the 1996 Act that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." 47 U.S.C. § 254(e)(4) (emphasis added).

charge $36.71 per month, for just $27.32. Declaration ¶ 10. This regulatory arbitrage will enable the new entrant to undercut USWC's prices substantially and thus to attract away many of USWC's most profitable customers.

As a result, USWC quickly will lose its ability to recover the universal service costs embedded in its rates for local service. Until explicit universal service systems are in place in accordance with section 254 of the Act,[15] USWC must continue to depend on the above-cost rates it is permitted to charge to certain classes of consumers to recover a substantial portion of its universal service costs. The regulatory arbitrage unleashed by the Reconsideration Order will make this impossible, inflicting substantial damage on USWC. In Colorado, for example, each lost business customer translates on average into $3.52 in lost universal service subsidies. Id. USWC has over 686,000 business lines in Colorado, so the total amount of its universal service recovery put at risk in this manner comes to about $29 million per year in the state of Colorado alone. Id. Moreover, the subsidies implicit in rates for local service are only part of the story. When USWC loses a business customer to a new entrant, the new entrant likely will begin providing interstate exchange access for that customer as well. The result for USWC in Colorado will be an average per-line loss in universal service support of approximately $14.81 per month, jeopardizing another $122 million in Colorado universal service support annually. Id. ¶ 11.

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[15] The Commission has ruled that section 254 does not require immediate implementation of explicit systems of universal service support at either the federal or state levels. See Universal Service Order ¶¶ 13-14. The Commission has announced that it intends to implement an explicit federal system by January 1, 1999, but state efforts are not subject to any particular timetable. See id. ¶¶ 2, 14.

The loss of this universal service support will harm not only USWC but the public interest as well. In passing the 1996 Act, Congress sought to ensure the "sufficient" and "predictable" funding of universal service. See 47 U.S.C. § 254 (b)(5). Enabling new entrants to destroy the viability of state universal service plans plainly is contrary to these goals. Moreover, giving new entrants a competitive advantage based solely on their ability to avoid state-mandated universal service contributions will distort the economic competition that the Act seeks to promote.

These harms will be irreparable. Courts have recognized that harms to a company's relationships with its customers are not readily compensated by damages and hence are irreparable.[16] Moreover, while the Reconsideration Order will cause USWC a rapid and substantial loss of universal service support, quantifying that loss after the fact will be difficult if not impossible. The as-needed, per-minute availability of shared transport at cost-based prices will have a substantial impact on the business strategies and hence the service needs of new entrants, preventing reliable measurement later of the amounts of wholesale, retail, and exchange access services that new entrants would have bought from USWC in the absence of the Reconsideration Order. Declaration ¶ 12. Nor will it be possible to quantify or remedy the harm to the public interest caused by the interim distortion of competition and interruption of universal service support.

Finally, staying the Reconsideration Order will not prevent other carriers from competing with USWC or otherwise cause them any substantial harm. New entrants will retain

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[16] See, e.g., Gateway Eastern Ry. Co. v. Terminal RR. Ass'n, 35 F.3d 1134, 1140 (7th Cir. 1994); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.2d 546, 552 (4th Cir. 1994); Basicomputer v. Scott, 973 F.2d 507, 512 (6th Cir. 1992).

the right to purchase from USWC, at cost-based prices, all of the unbundled elements needed to provide whatever transport services they need. To the extent that a new entrant wishes to avoid an up-front commitment or the responsibility of combining the different elements itself, it may purchase USWC's finished services at discounted wholesale prices pursuant to section 251(c)(4). For example, any new entrant whose volume on a particular route is too small to buy the unbundled elements needed to provide transport may simply buy USWC's finished service, which includes the transport component, and resell it at a retail markup. Therefore, in light of the substantial and irreparable harms the Reconsideration Order threatens to inflict, the balance of equities overwhelmingly favors a stay.

CONCLUSION

For these reasons, U S WEST respectfully requests that the Commission stay implementation of the Reconsideration Order and the associated amendment of the Commission's rules, pending resolution of U S WEST's and any other petitions for judicial review of the order. Should the Commission not rule on this request for stay by September 16, 1997, U S WEST reserves the right to treat such lack of decision as a denial, and to seek a stay from the appropriate court of appeals.

Respectfully submitted,

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September 9, 1997

DECLARATION OF MICHAEL R. JUDE

1. I am a Manager in the U S WEST Communications Markets Regulatory Strategy group with over sixteen years experience in telecommunications, including postitions in network planning and engineering, information systems, data communications, and public policy. My current responsibilities include managing federal advocacy for the market units of U S WEST Communications, which involves helping regulatory agencies understand the impact of rules and regulations on the business of U S WEST. In previous positions I have been deeply involved in, for example, developing analyses on the cost components of Part 32 affiliate interest transactions and the costs associated with deploying outside plant facilities. I have a Bachelor's Degree in Electrical Engineering and a Master's Degree in Engineering Management. I currently am completing a Ph.D. in Administration/Management with an emphasis on innovation. My education and experience in telecommunications service provision enable me to address knowledgeably the impact on U S WEST of the Federal Communications Commission's Third Order on Reconsideration in CC Dockets Nos. 96-98 and 95-185 ("Reconsideration Order").

2. The Reconsideration Order can be read to require an incumbent such as U S WEST to provide new entrants access, on a shared basis with U S WEST, to all the same interoffice transport facilities or capacity in U S WEST's local exchange network -- plus access to the routing tables that direct traffic within that network -- that U S WEST uses for its own traffic. A new entrant purportedly would be able to obtain a service comprising access to U S

WEST's entire interoffice network on an as-needed basis, rather than access to any particular facility or capacity within a facility, with the new entrant paying only for its actual use of the network. Prices would be cost-based and usage-sensitive. In addition, a new entrant would be able to require U S WEST to provide a combination of "network elements" comprising its interoffice network plus local switching plus a U S WEST-provided unbundled loop, which would be in all respects the functional equivalent of the finished local exchange services that U S WEST provides to its business customers. U S WEST's competitors would be able to obtain the equivalent of U S WEST's finished retail services at U S WEST's cost of providing those services rather than at the discounted wholesale rates that the States have set pursuant to the procedures of the Telecommunications Act of 1996. In addition, competitors would be able to obtain the equivalent of the exchange access services that U S WEST provides to long distance carriers, but again at cost-based prices.

3. As U S WEST had envisioned a new entrant's local exchange network built on U S WEST's unbundled network elements, the new entrant would construct its network with discrete piece parts provided by U S WEST. The transport between switches, which is essential to such a network, would be reserved by the new entrant on a dedicated basis, as would local switching and signaling. Unbundled loops would in effect be reserved in their entirety. Thus, the new entrant would obtain complete control over facilities which it used to provide its own service. And the new entrant would pay for the elements based on U S WEST's costs of providing them. In contrast, if a new entrant wished to resell a local exchange service that U S WEST itself sells to end users, the new entrant would purchase the local exchange service itself at a price based on the regulated retain price set by state regulators for the local exchange